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THE AMERICAN CONSTRUCTION OF THE MOST-FAVORED-NATION CLAUSE ¹

CONCESSIONS IN IMPORT DUTIES

In a communication to the Congress of the Confederation, February 20, 1787, the Netherlands minister protested against an Act of the legislature of the State of Virginia, which exempted French brandies imported in French and American vessels from certain duties to which like commodities imported in vessels of the Netherlands were left liable, as in contravention of the most-favored-nation clause in Article II of the treaty of 1782. This article provided that the subjects of the Netherlands should pay in the ports of the United States no other or greater duties or imposts of whatever nature or denomination than those which the nations the most favored were or should be obliged to pay; and that they should enjoy all the rights, liberties, privileges, immunities and exemptions in trade, navigation and commerce which the most favored nations did or should enjoy. The article contained no express qualification that the favor or privilege should be extended freely if freely given or for an equivalent if conditional. John Jay, the Secretary for the Department of Foreign Affairs, to whom the protest had been referred, in his report to Congress in October, 1787, said:

It is observable that this article takes no notice of cases where compensation is granted for privileges. Reason and equity however, in the opinion of your Secretary, will supply this deficiency. * * * Where a privilege is gratuitously granted, the nation to whom it is granted becomes in respect to that privilege a favored nation * * * but where the privilege is not gratuitous, but rests on compact, in such case the favor, if any there be, does not consist in the privilege yielded but in the consent to make the contract by which it is yielded. * * * The favor therefore of being admitted to make a similar bargain is all that in such cases can reasonably be demanded under the article. Be-

¹ An address before the Fifth Annual Meeting of the American Society of International Law, April 29, 1911 (Proceedings, 240), has been incorporated in this article.—S. B. C.

sides, it would certainly be inconsistent with the most obvious principles of justice and fair construction, that because France purchases, at a great price, a privilege of the United States, that therefore the Dutch shall immediately insist, not on having the like privileges at the like price, but without any price at all.²

It may give additional weight to the view as here expressed to note that in the opinion of the Secretary, the reduction in question of the duty on French brandies by the State of Virginia having been gratuitous, the subjects of the Netherlands were entitled to the same reduction. This rule of construction of the most-favored-nation clause as formulated by Jay,—that a concession made for valuable consideration does not pass automatically and without equivalent to the favored nation,—has been consistently maintained, at least in respect of special concessions in import duties, by subsequent Secretaries of State—by Secretaries Adams, Van Buren, and Clay, in respect of Article VIII of the treaty of April 30, 1803, with France; by Secretary Livingston in respect of Articles V and IX of the treaty of August 27, 1829, with Austria; by Secretary Frelinghuysen in respect of Article II of the treaty of July 3, 1815, with Great Britain; by Secretaries Bayard, Gresham, and Sherman in respect of various treaties.³ The reason of the rule is stated by Mr. Sherman, Secretary of State, as follows:

It is clearly evident that the object sought in all the varying forms of expression is equality of international treatment, protection against the wilful preference of the commercial interests of one nation over another. But the allowance of the same privileges and the same sacrifice of revenue duties, to a nation which makes no compensation, that had been con-

² The same view was taken by Jefferson as to a most favored nation clause, when conditionally expressed, in a letter to Monroe, Dec. 10, 1784. *Writings* (Ford ed.), IV, 19. See also *Writings of Monroe*, I, 36.

³ See Moore, *Int. Law Digest*, V, 257-319. See also *Memorandum by John Ball Osborne*, Sen. Doc. 29, 62d Cong. 1st Sess. The position taken by the government in 1898, in reference to the most-favored-nation clause in the treaty of 1850 with Switzerland, is not an exception to the rule. There appeared to be an agreement between the parties in respect of the interpretation to be placed upon the clause. *For Rel.*, 1899, 746-748. As to the rule of construction in foreign countries, see M. L. E. Visser, *Revue de Droit International et de Législation Comparée*, 1902 (2nd series), IV, 66, 159, 270; S. K. Hornbeck, *American Journal of International Law*, III, 395, 619, 797; C. C. Hyde, *id.*, III, 57; J. R. Herod, *Favored Nation Treatment*; and N. D. Harris, *Proceedings of American Society of International Law*, Fifth Annual Meeting (1911), 228.

ceded to another nation for an adequate compensation, instead of maintaining, destroys that equality of market privileges which the "most-favored-nation" clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price. It would thus become the source of international inequality and provoke international hostility.⁴

The same rule has, as regards special concessions in import duties based upon valuable considerations, been applied by the Supreme Court. In the case of *Whitney v. Robertson*, the court, by Mr. Justice Field, said:

In *Bartram v. Robertson*, decided at the last term (122 U. S. 116), we held that brown and unrefined sugars, the produce and manufacture of the island of St. Croix, which is part of the dominions of the king of Denmark, were not exempt from duty by force of the treaty with that country, because similar goods from the Hawaiian Islands were thus exempt. The first article of the treaty with Denmark provided that the contracting parties should not grant "any particular favor" to other nations in respect to commerce and navigation, which should not immediately become common to the other party, who should "enjoy the same freely if the concession were freely made, and upon allowing the same compensation if the concession were conditional." 11 Stat. 719. The fourth article provided that "no higher or other duties" should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. And we held in the case mentioned that "those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the king of Denmark, to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges."

The counsel for the plaintiffs meet this position by pointing to the omission in the treaty with the Republic of San Domingo of the provision as to free concessions, and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our government to another country, without that

⁴ Inst. to Mr. Buchanan, Jan. 11, 1898. Moore, *Int. Law Digest*, V, 278.

concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the treaty with that republic, in the clause quoted, is substantially like the 4th article in the treaty with the king of Denmark. And as we said of the latter, we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.⁵

Accordingly, to entitle the claimant under the most-favored-nation clause, even if not conditionally expressed, to the privilege or concession, it must appear either that the particular privilege claimed has been extended gratuitously to the third Power; or that the claimant nation has extended to the United States the exact equivalent for which the particular privilege was extended to the third Power; or that the act depriving the claimant of the particular privilege claimed is discriminatory. If the privileges claimed have been specifically extended by treaty stipulations, they are presumed to have been based upon a consideration and not to have been gratuitous, for the usual purpose of a treaty is to secure benefits for concessions, not to record the exchange of free gifts. This presumption does not arise if the privileges have been extended unconditionally by acts of legislation, not in execution of treaty stipulations, for such acts are not presumably the result of negotiation with foreign nations. It has been held by the Court of Customs Appeals that the right of free entry into the United States of untaxed pulp made from untaxed wood, provided for in section 2 of the Act of July 26, 1911, "to promote reciprocal trade relations with the Dominion of Canada and for other purposes," was granted by the United States to Canada without consideration, and that the same right of free entry therefore passed automatically to other Powers enjoying most-favored-nation

⁵ 124 U. S. 190. See also *Shaw & Co. v. United States*, 20 Treasury Decisions, No. 16, p. 35; 1 Ct. Cust. Appls. 426; *Taylor v. Morton*, 2 Curtis, 454; *Ropes v. Clinch*, 8 Blatchf. 304.

treatment.⁶ In treaties of commerce the equivalent for which a particular concession is made may be such that the exact equivalent can be offered by no other nation, such, for instance, as considerations based upon extent of territory, population, variety of products, and propinquity. So also the treaty may comprise various articles, of which a particular article may be consented to by one of the parties in consideration of benefits received in other articles.

Attorney General Williams, however, advised that the provisions of Article IV of the treaty with Belgium of July 17, 1858, exempting steam vessels of the United States and of Belgium engaged in regular navigation between the two countries, from the payment of tonnage, anchorage, and light-house dues, became immediately applicable, *mutatis mutandis*, to Sweden and Norway, by virtue of Article II of the treaty of April 3, 1783 and Articles VIII and XVII of the treaty of July 4, 1827 with those countries, and to Bremen, by virtue of Article IX of the treaty of December 20, 1827 with the Hanseatic Republics.⁷ This view was accepted by the Government of the United States, and resulted in the termination of the treaty with Belgium, pursuant to notice.⁸ In case of Sweden and Norway, it appeared that no line of steam vessels of the United States was, at the time, engaged in regular navigation between the United States and Sweden and Norway. Accordingly, it could not with certainty be stated, observed the Attorney General, whether tonnage duties would or would not be levied on American vessels in the ports of those countries. "It is," he concluded, "to be presumed that they will, when the occasion shall arise, faithfully perform their duty under the treaties; for the obligations imposed by them are reciprocal." In case of Bremen, it appeared that no tonnage tax was imposed on American vessels entering from ports of the United States.

With respect to discriminatory legislation, it has been held that an Act of Congress of June 26, 1884, sec. 14, which imposed a duty of three

⁶ Importations from Norway, Russia, Austria-Hungary, and Germany were involved in the decision, *American Express Co. et al. v. United States*, and *Bertuch & Co. et al. v. United States*, dated May 12, 1913, and printed in Judicial Decisions in this number of the JOURNAL.

⁷ 14 Op. 468, 530. See also 16 Op. 276, 626.

⁸ Notes to *Treaties and Conventions*, between the United States and other powers, 1776-1887, p. 1248.

cents per ton on all vessels from any foreign port in "North America, Central America, the West India islands, the Bahama islands, the Bermuda islands, or the Sandwich islands or Newfoundland," and a duty of six cents per ton on vessels from all other foreign ports, did not entitle German vessels entering the United States from European ports to the three cent rate, under the treaties of December 20, 1827 and May 1, 1828, since the classification was merely geographical, the three cent rate applying to vessels of all nations coming from the privileged ports.⁹ So also it has been held that a State pilotage law subjecting all vessels, domestic and foreign, engaged in foreign trade to pilotage regulations, but exempting pursuant to law coastwise steam vessels of the United States, was not in conflict with the provisions in the treaty with Great Britain stipulating that British vessels should not be subject to any higher or other charges than vessels of the United States, since such exemption did not "operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade."¹⁰ Attorney General Olney, in an opinion dated November 13, 1894, advised that Germany was not, by virtue of the most-favored-nation clause in the treaty of May 1, 1828, entitled to the free entry of salt into the United States under paragraph 608 of the Tariff Act of August 27, 1894. This paragraph placed salt on the free list, but provided that the rate of duty existing prior to the passage of the Act should be collected on salt imported from any country which imposed a duty on salt exported from the United States. American salt was dutiable on importation into Germany. In the course of the opinion, the Attorney General said:

The form which the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted free here, while any country putting a duty upon American

⁹ *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17. See, to like effect, 18 Op. Atty. Gen. 260.

¹⁰ *Olsen v. Smith*, 195 U. S. 332, 344. See also *Compagnie Francaise &c. v. Louisiana State Board of Health*, 186 U. S. 380, 394, dissenting opinion of Mr. Justice Brown, 397, 400; *Powers v. Comly*, 101 U. S. 789; *Head Money Cases*, 112 U. S. 580; *Thingvalla Line et al. v. United States*, 24 C. Cls. 255.

salt shall have its salt dutiable here under the preëxisting statute. In other words, the United States concedes "free salt" to any nation which concedes "free salt" to the United States. Germany, of course, is entitled to that concession upon returning the same equivalent. But otherwise she is not so entitled, and there is nothing in the "most-favored-nation clause" which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price.¹¹

The same conclusion was reached by the Court of Customs Appeals as to concessions for reciprocal considerations made under sec. 3 of the Tariff Act of 1897.¹² The court said:

Section 3 of the tariff act of 1897 was a general law; its attitude toward every nation was uniform. It offered no special favor to France, or Germany, or Italy, or any other country. Every foreign nation was treated alike by the terms of the law. It was equally within the opportunity of England to negotiate a reciprocity treaty as it was within the opportunity of France.

ADMINISTRATION ON ESTATES OF DECEASED ALIENS

State courts have in various cases coming before them held that the consuls of a nation enjoying most-favored-nation treatment were entitled to privileges and rights in administration on the estates of deceased countrymen extended by treaty to consuls of a third nation. The Supreme Court of Louisiana has, for instance, held that French consuls, by virtue of the most-favored-nation clause in Article XII of the treaty with France of 1853, have the same right as enjoyed by Belgian consuls under Article XV of the treaty with Belgium of 1880, to appear in all proceedings on behalf of absent or minor heirs.¹³ The surrogates of Westchester¹⁴ and Albany¹⁵ counties of New York, the Appellate Division of the Supreme Court of New York¹⁶ and the Supreme Court of

¹¹ 21 Op. 80.

¹² *Shaw & Co. v. United States*, 20 Treasury Decisions (31500), No. 16, p. 35; 1 Ct. Cust. Appls. 426.

¹³ *Succession of Robasse*, 47 La. Ann. 1452; 49 *Id.* 1405. See also *Succession of Amat*, 18 *Id.* 405; *In re Peterson's Will*, 101 N. Y. S. 285.

¹⁴ *In re Fattosini's Estate*, 67 N. Y. S. 1119, and *In re Lobrasciano's Estate*, 77 N. Y. S. 1040.

¹⁵ *In re Silvetti's Estate*, 122 N. Y. S. 400.

¹⁶ *In re Scutella's Estate*, 129 N. Y. S. 20.

Alabama ¹⁷ have held that Italian consuls, by virtue of the most-favored-nation clause in Article XVII of the consular convention between the United States and Italy of May 8, 1878, were entitled to all the rights and privileges in the administration on the estates of deceased countrymen enjoyed by consuls of the Argentine Republic under Article IX of the treaty of July 27, 1853.¹⁸ Article IX of the Argentine treaty was construed in each of these cases as conferring on the consul the right of administration in preference to the public administrator as provided for in the local laws. The same view was taken by the Supreme Judicial Court of Massachusetts ¹⁹ as to the rights of a Russian consul under the most-favored-nation clause in Article VIII of the treaty of 1832 between the United States and Russia. The surrogate of New York county ²⁰ placed a different construction on the Argentine treaty.

In each of the above cases the court merely considered the question whether the right claimed was embraced in the terms of the Argentine treaty. It does not appear that the right of the consular officer to invoke, under the most-favored-nation clause, any privilege extended by treaty to consuls of a third Power, was questioned. In a case coming before the District Court of Appeal of California, this right was questioned;²¹ but neither that court nor the Supreme Court of California, affirming the decision, found it necessary to decide this question. The claim was denied on the ground that Article IX of the Argentine treaty was not intended to commit to the consular officers the administration in preference to those entitled by the local law.²² This decision was affirmed by the Supreme Court of the United States.²³ The question whether the most-favored-nation clause in the Italian treaty automatically carried the privileges of the Argentine treaty in this respect was expressly excepted by the court from its decision. It was held that even the terms of Article IX of the Argentine treaty, which provide that in case a citizen of either of the contracting parties shall die intestate

¹⁷ *Carpigiani v. Hall*, 55 So. 248.

¹⁸ See, also, *In re Davenport*, 89 N. Y. S. 537; *In re Bristow*, 118 N. Y. S. 686.

¹⁹ *McEvoy v. Wyman*, 191 Mass. 276.

²⁰ *In re Logiorato's Estate*, 69 N. Y. S. 507.

²¹ *In re Ghio's Estate*, Am. Journal of Int. Law, IV, 726.

²² 157 Cal. 552.

²³ *Rocca v. Thompson*, 223 U. S. 317.

in the territories of the other the proper consular officer of the country to which the deceased belonged "shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," were not intended to give to the consul the right of original administration to the exclusion of one authorized by local law to administer the estate. In the argument before the court it was urged that the rights and privileges enjoyed by Argentine consuls were granted for and in consideration of valuable rights and privileges granted by the Argentine Republic under the treaty to American consuls; and that, under the rule applied in the case of *Whitney v. Robertson*, in respect of valuable concessions in import duties, these rights and privileges granted to Argentine consuls for valuable equivalents did not pass automatically and without equivalents to third Powers. It has subsequently been held by the Supreme Court of Minnesota that Article XIV of the treaty with Sweden of June 1, 1910,—the provisions of which had been invoked by an Austrian consul under the most-favored-nation clause in Article XV of the treaty with Austria of July 11, 1870,—gave to the consul the right to administration only so far as the local laws permitted.²⁴ The surrogate of New York county has held that Article X of the treaty with Paraguay of February 4, 1859, and Article XIV of the treaty with Sweden of June 1, 1910, gave to consuls of these countries the right to administration; and that the same right was, by virtue of the most-favored-nation clause, enjoyed by consuls of Italy,²⁵ and of Austria-Hungary.²⁶ Likewise, the surrogates of Schenectady,²⁷ Herkimer,²⁸ and Erie²⁹ counties, New York, have ruled that an Italian consul, invoking by virtue of the most-favored-nation clause, the provisions of Article XIV of the treaty between the United States and Sweden of June 1, 1910, has the right to administration on the estate of an Italian subject dying intestate in the United States. In the first named case the right of the consul was upheld in preference to a distant resident relative not entitled to succeed

²⁴ *In re Estate of Lis*, 139 N. W. 300.

²⁵ *In re Baglieri's Estate*, 137 N. Y. S. 175.

²⁶ *In re Jarema's Estate*, 137 N. Y. S. 176.

²⁷ *In re Lombardi*, 138 N. Y. S. 1007.

²⁸ *In re Ricardo*, 140 N. Y. S. 606.

²⁹ *In re Madaloni's Estate*, 141 N. Y. S. 323.

to the personalty; in the second, in preference to resident creditors; and in the third, in preference to a brother residing in this country, the father of the decedent being a subject and resident of Italy.³⁰

CONSULAR JURISDICTION OVER SEAMEN

Mr. Buchanan, Secretary of State, denied the right of the Austrian Government, under the most-favored-nation clause, to the benefit of stipulations in the treaties between the United States and certain other Powers, conferring upon their respective consuls jurisdiction over disputes between the masters and crews of vessels. In a note to the Austrian chargé d'affaires, May 18, 1846, Mr. Buchanan said:

Seeing that the right now under consideration, where it can be claimed under a treaty wherein it is expressly conferred is, in every such instance, given in exchange for the very same right conferred in terms equally express upon the consuls of the United States, it can not be expected that it will be considered as established by the operation of a general provision which, if it were allowed so to operate, would destroy all reciprocity in this regard, leaving the United States without that equivalent in favor of their consuls, which is the consideration received by them for the grant of this right wherever expressly granted.³¹

In 1866, Attorney-General Speed, on the other hand, advised that the American consul at Honolulu had, by virtue of the most-favored-nation clause in Article X of the treaty between the United States and the Hawaiian Islands, the same jurisdiction of disputes on American merchant vessels between American citizens as was conferred upon French consuls by treaty between the Hawaiian Islands and France.³² The opinion of the Attorney General was adopted by Mr. Seward in his instructions of July 3, 1866, to the American minister-resident at Honolulu.³³ The statement of Mr. Justice Bradley, in writing the opinion

³⁰ As to the right of foreign consuls to exemption from attendance in court as witnesses in virtue of most-favored-nation privileges, see *Baiz v. Malo*, 58 N. Y. S. 806; *United States v. Trumbull*, 48 Fed. 94; *In re Dillon*, 7 Sawy. 561.

³¹ Moore, *Int. Law Digest*, V, 261.

³² 11 Op. Atty. Gen. 508.

³³ Mr. Seward to Mr. McCook, July 3, 1866. Dip. Cor. 1866, II, 488. See opinion of Attorney General Cushing, in 1853, holding that the stipulation for restitution of deserting seamen, in our treaty with Norway and Sweden of July 4, 1827, did not extend to Denmark in virtue of the most-favored-nation clause in respect of naviga-

of the court, in *Dainese v. Hale*,³⁴ that citizens of the United States, by virtue of the treaty of 1862 with the Ottoman Porte, seem to be guaranteed the same right to have their civil controversies decided by their own minister and consuls as enjoyed by subjects of other Christian nations, does not fully meet the issue. The treaty in question provided, in Article I, that all rights, privileges or immunities which the Sublime Porte then granted or might thereafter grant to, or suffer to be enjoyed by, the subjects of any other foreign Power, should be equally granted to and exercised and enjoyed by the citizens of the United States. The rights of extritoriality enjoyed by the subjects of other Powers and sought in this case were, however, based, not upon reciprocal concessions, but upon long usage and custom and the early Capitulations.

PATENTS AND TRADE-MARKS

Of the right of American citizens, under the most-favored-nation clause in our treaty with Japan, to the same protection in trade-marks and patents in Japan, as secured to German subjects by treaty stipulation, Mr. Olney, Secretary of State, in instructions to the American minister to Japan, November 12, 1896, said:

In the Department's judgment, the provision of the treaty of 1854, to which you refer, does not mean if Japan shall grant privileges to Germany in consideration of similar privileges granted by the latter to the former, the same privileges shall be granted gratuitously to the United States. The clause "that these same privileges and advantages shall be granted likewise to the United States and to the citizens thereof, without any consultation or delay," only refers, in my opinion, to privileges granted gratuitously to a third Power and not to privileges granted in consideration of concessions made by another government.³⁵

RIGHT TO HOLD AND DISPOSE OF REAL ESTATE

With respect to the extension to aliens of the right to hold real property, Mr. Bayard, Secretary of State, applying the same rule as in favors or concessions in matters of commerce, said:

This quality of reciprocity, which takes a case out of the category of gratuitousness, belongs, I apprehend, to all our concessions to foreign
tion and commerce, 6 Op. Atty. Gen. 148. See, however, Consular Regulations of the United States, sec. 78.

³⁴ 91 U. S. 13, 18.

³⁵ Moore, *Int. Law Digest*, V, 315.

states giving their citizens rights to hold real estate in the United States. Such concessions are based on reciprocity. We give the rights to them because they give the right to us. Hence such privileges can not be claimed under "the most-favored-nation" clause by foreign governments to which they are not specially conceded.³⁶

The Supreme Court of Louisiana has held that the clause in Article XXII of the treaty of 1871 with Italy, providing that in "the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation," entitles Italian subjects to the same exemptions from the payment of the tax imposed on real estate inherited by alien non-resident heirs as enjoyed by subjects and citizens of France under Article VII of the treaty of 1853. The court said:

The heir (a citizen and resident of the Kingdom of Italy) of the deceased is quite as much entitled to the protection of the French treaty, as were the subjects and citizens of France—he having invoked the benefit of the "most-favored-nation" clause in the Italian treaty with the United States.³⁷

RIGHTS OF RESIDENCE

Article VI of the treaty with China of 1868 has been on numerous occasions before the Federal courts for construction. This article reads:

Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.

It has been held by the Circuit Court, District of California, that a provision in the constitution of the State of California prohibiting the employment by a corporation formed under the laws of the State, in any capacity, of any Chinese or Mongolian, and the Act of the legislature

³⁶ Mr. Bayard, Sec. of State, to Mr. Miller, June 15, 1886. Moore, *Int. Law Digest*, V, 272.

³⁷ Succession of Rixner, 48 La. Ann. 552, 565. See *Frederickson v. State of Louisiana*, 23 How. 445; *Prevost v. Greneaux*, 19 How. 1; *Lee v. Boise Development Co.*, 21 Idaho, 461.

of that State providing for the punishment of violations of this provision, were in conflict with the treaty with China and were therefore void. Mr. Justice Sawyer said:

Any legislation or constitutional provision of the State of California which limits or restricts that right to labor to any extent, or in any manner not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty; and such are the express provisions of the constitution and statute in question.³⁸

An Act of the legislature of Oregon which prohibited the employment of Chinese laborers on street improvements or public works, and at the same time permitted all other aliens so to be employed, was declared by Mr. Justice Deady in the Circuit Court, District of Oregon,³⁹ to be in conflict with the treaty between the United States and China, which, by its most-favored-nation clause, secured to the Chinese residents the same right to be employed and to labor for a living as the subjects of any other nation.⁴⁰ In an earlier case⁴¹ the same judge said:

Article VI of the treaty with China of July 28, 1868, provides that citizens and subjects of the two nations shall respectively enjoy the same privileges, immunities or exemptions in respect to travel or residence within the country of the other as may there be enjoyed by the citizens or subjects of the most favored nation. The right to reside in the country with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these Powers. Therefore, the provisions in the mining regulations of Poorman Creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the State constitution to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void.

In declaring a statute of the State of California, prohibiting all aliens incapable of becoming electors of the State from fishing in the waters of the State, to be in contravention of Articles V and VI of the treaty with China, Mr. Justice Sawyer said:

Citizens of other States having no property right which entitles them to fish against the will of the State, *a fortiori* the alien, from whatever

³⁸ *Parrott's Case*, 6 Sawy. 349, 375.

³⁹ *Baker v. City of Portland*, 5 Sawy. 566.

⁴⁰ See also *I. M. Ludington's Sons*, 131 N. Y. S. 550; *People v. Warren*, 34 N. Y. S. 942.

⁴¹ *Chapman v. Toy Long*, 4 Sawy. 28, 36.

country he may come, has none whatever in the waters or the fisheries of the State. Like other privileges he enjoys as an alien by permission of the State, he can only enjoy so much as the State vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the State, therefore, while Germans, Italians, Englishmen and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let or hindrance, is to prevent him from enjoying the same privileges as are "enjoyed by the citizens or subjects of the most favored nation;" and to punish him criminally for fishing in the waters of the State, while all aliens of the Caucasian race are permitted to fish freely in the same waters with immunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions "as are enjoyed by the citizens or subjects of the most favored nation;" and such discriminations are in violation of Articles V and VI of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the State may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege, it must permit all others to enjoy, upon like terms, the same privileges whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.⁴²

The Circuit Court, Northern District of California (Sawyer, C. J.), held an ordinance of the city of San Francisco, making it unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in a certain prescribed district, and requiring all Chinese inhabitants theretofore located outside the prescribed district to remove within a specified time, to be in contravention of our treaty pledge with China.⁴³ Likewise the District Court, Southern District of California (Ross, D. J.), held that a covenant in a deed not to convey or to lease to a Chinaman, being at variance with our treaty with China, was not enforceable in a court of equity of the United States.⁴⁴ Mr. Justice Field, in circuit, in declaring an ordinance of the city of San Francisco arbitrarily prohibiting the conduct

⁴² *In re Ah Chong*, 6 Sawy. 451, 455. See, however, *Leong Mow v. Board of Commissioners*, 185 Fed. 223.

⁴³ *In re Lee Sing* (1890), 43 Fed. 359.

⁴⁴ *Gandolfo v. Hartman* (1892), 49 Fed. 181. See also *Lee v. Boise Development Co.* (1912), 21 Idaho, 461.

of the laundry business within certain sections of the city, to be in conflict with the treaty provisions with China, said:

The petitioner (a subject of the Emperor of China) is an alien, and under the treaty with China is entitled to all the rights, privileges, and immunities of subjects of the most favored nation with which this country has treaty relations. Being a resident here before the passage of the recent Act of Congress, restricting the immigration of subjects of his country, he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the State, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws.⁴⁵

In a report to the President, January 7, 1893, on a bill pending in the Senate for prohibiting for a period of one year, on account of the prevalence of cholera, the admission into the United States of any alien coming, for settlement or permanent residence, from any except American countries, Mr. Foster, Secretary of State, said:

The only pertinence of the "favored-nation" clauses included under the second class, hereinbefore referred to [those securing generally to the citizens or subjects of another country the same privileges of residence and trade as enjoyed by the citizens or subjects of the most favored nation], is that the bill puts no restriction upon immigration from American countries. If immigration from those countries were to be allowed on account of some treaty obligation, or as a favor, it might give occasion for other countries to invoke a favored-nation clause in their treaty. Such absence of restriction, however, with reference to American countries is not in fact based upon either, but depends simply upon the fact that the threatened danger which it is the purpose of the legislation to avert does not exist in this hemisphere. I see no opportunity for invoking a favored-nation clause unless the danger in question equally existed in American countries, and the immigration therefrom in magnitude and other respects should make the case exactly the same with respect to both American and European countries, so that a restriction with respect to one and not the other would have in it no element of reasonable discretion, but plainly be an act of discrimination.⁴⁶

A case quite different arose in 1900 at the time of the threatened epidemic of bubonic plague. The board of health of the city of San Fran-

⁴⁵ *In re Quong Woo* (1882), 13 Fed. 229, 233.

⁴⁶ Moore, *Int. Law Digest*, IV, 153, 157. See, to same effect, *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17.

cisco adopted regulations prohibiting any Asiatic person from leaving the city without first submitting to inoculation with a serum supposed to be preventive, but the administration of which to a person who had been exposed to the disease was dangerous to life. The Government of Japan remonstrated against these regulations as in derogation of the rights of travel and residence guaranteed to subjects of Japan in the most-favored-nation clause of Article I of the treaty of 1894.⁴⁷ The Circuit Court, Northern District of California,⁴⁸ held the regulations to be discriminatory and in violation of the constitutional guaranty of the equal protection of the law, without entering into the question of treaty rights. These regulations, said the court,

are directed against the Asiatic race exclusively, and by name. There is no pretense that previous residence, habits, exposure to disease, method of living, or physical condition has anything to do with their classification as subject to the regulations. They are denied the privilege of traveling from one place to another, except upon conditions not enforced against any other class of people.⁴⁹

The decision in each of the cases above noted was based upon the fact of discrimination (the inhibitions of the Constitution being therefore sufficient to cover the case), and did not involve the question whether the favor or concession enjoyed by the subjects of other Powers, but denied to the claimant, was extended to those other Powers gratuitously or in consideration of equivalents. As to what constitutes discrimination against a race, the decisions of the Supreme Court in cases arising under the Fourteenth Amendment to the Constitution afford liberal and not uncertain standards. "The equal protection of the laws is a pledge of the protection of equal laws."⁵⁰

SAMUEL B. CRANDALL.

⁴⁷ *For. Rel.* 1900, 737-757; *Id.* 1901, 375.

⁴⁸ *Wong Wai v. Williamson*, 103 Fed. 1.

⁴⁹ See, for discussion evoked in 1906 by the passage of a resolution by the Board of Education of San Francisco for the segregation of children of Orientals, *Cong. Record*, 59th Cong. 2d Sess. 297, 301, 303, 674, 1231, 1234, 1235, 1236, 1237, 1515, 1522, 1579, 3132; *Proceedings of the American Society of International Law*, April 19-20, 1907, 44, 150, 173, 194, 201, 211, 213.

⁵⁰ *Matthews, J., Yick Wo v. Hopkins*, 118 U. S. 356, 369.